Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

B&G ENTERPRISES, LTD.,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether block grants authorized by Congress in 42 U.S.C. § 300x-26(a) and implemented by the Department of Health and Human Services and carried out by the states and their subdivisions rendered the action taken by the states attributable to the federal government as a taking of property under the Fifth Amendment to the Constitution.

a. Whether an affirmative act to compel or coerce action of a state that results in a taking is necessary to attribute the taking to the federal government.

b. Whether the activities of the State of California enforcing a ban on cigarette vending machines, pursuant to a federal block grant program, are attributable to the federal government.

c. Whether a party seeking just compensation from the federal government for state action must prove that the state was acting as the common law agent of the federal government.

PARTIES TO THE PROCEEDING BELOW AND CORPORATE DISCLOSURE STATEMENT

Petitioner was the only party below other than the Government. It is not publicly owned.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered in Case No. 99-5114 on August 22, 2000.

OPINION BELOW

The underlying opinion of the Court of Appeals is reported at 220 F.3d 1318 and is appended hereto (A-3). The Court of Appeals' order denying rehearing is appended hereto (A-2). The opinion of the Court of Federal Claims is reported at 43 Fed. Cl. 523 and is appended hereto (A-15).

JURISDICTIONAL STATEMENT

The case was brought in the Court of Federal Claims under 28 U.S.C. §§ 1491. The decision of the Court of Appeals was entered on July 20, 2000. Rehearing was denied by the Court of Appeals on August 22, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitution of the United States, Amendment Five provides in pertinent part:

> ...nor shall private property be taken for public use, without just compensation.

The Alcohol, Drug Abuse and Mental Health Organization Act, 106 STAT 322, 42 U.S.C. § 300x-26(a) ("ADAMHA"), provides:

> STATE LAW REGARDING SALE OF TOBACCO PRODUCTS TO INDIVIDUALS UNDER AGE OF 18.
>
> (a) RELEVANT LAW.--

(1) In General.-- Subject to paragraph (2), for fiscal year 1994 and subsequent fiscal years, the Secretary may make a grant under section 1921 only if the State involved has in effect a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18.

* * *

(b) ENFORCEMENT.--

(1) In General.-- For the first applicable fiscal year and for subsequent fiscal years, a funding agreement for a grant under section 1921 is that the State involved will enforce the law described in subsection (a) in a manner that can reasonably be excepted to reduce the extent to which tobacco products are available to individuals under the age of 18.

(2) ACTIVITIES AND REPORTS REGARDING ENFORCEMENT.--

For the first applicable fiscal year and for subsequent fiscal years, a funding agreement for a grant under section 1921 is that the State involved will--

(A) annually conduct random, unannounced inspections to ensure compliance with the law described in subsection (a); and

(B) annually submit to the Secretary a report describing—

(i) the activities carried out by the State to enforce such law during the fiscal year preceding the fiscal year for which the State is seeking the grant;

(ii) the extent of success the State has achieved in reducing the availability of tobacco products to individuals under the age of 18; and

(iii) the strategies to be utilized by the State for enforcing such law during the fiscal year for which the grant is sought.

(c) NONCOMPLIANCE OF STATE.— Before making a grant under section 1921 to a State for the first applicable fiscal year or any subsequent fiscal year, the Secretary shall make a determination of whether the State has maintained compliance with subsections (a) and (b). If, after notice to the State and an opportunity for a hearing, the Secretary determines that the State is not in compliance with such subsections, the Secretary shall reduce the amount of the allotment under such section for the State for the fiscal year involved by an amount equal to. . .

West's Ann. Cal. Bus. Code § 22960 provides:

Vending machines and appliances; sale or distribution of tobacco; local standards; inconsistencies with state law

(a) Except as provided in subdivision (b), no cigarette or tobacco product shall be sold, offered for sale, or distributed from a vending machine or appliance, or any other coin or token operated mechanical device designed or used for vending purposes, including, but not limited to machines or devices that use remote control locking mechanisms.

(b)(1) Commencing January 1, 1996, cigarette or tobacco product vending machines or appliances may be located at least 15 feet away from the entrance of a premise issued an on-sale public premises license as defined in Section 23039 by the Department of Alcoholic Beverage Control to sell alcoholic beverages.

(2) As used in this subdivision "at least 15 feet away from the entrance" means within the premises of the licensed establishment and not outside those premises.

(c) this section and subdivision (b) of Section 22958 set forth minimum state restrictions on the sale of cigarettes or tobacco products from vending machines or devices and do not preempt or otherwise prohibit the adoption of a local standard that further restricts access to and reduces the availability of cigarette or tobacco products

from vending machines or devices or that imposes a complete ban on the sale of cigarettes or tobacco products from vending machines or devices. A local standard that further restricts or imposes a complete ban on the sale of cigarettes or tobacco products from vending machines or devices shall control in the event of an inconsistency between this section and a local standard.

CAUSE OF PROCEDINGS BELOW AND DESCRIPTION BELOW

B & G Enterprises, Ltd. ("B&G") filed its complaint in the Court of Federal Claims on July 21, 1998. The Government, on August 12, 1998, filed a motion to stay. The trial court held a hearing on September 17, 1998. At that hearing it was agreed that the other pending cases would be stayed pending a resolution of the block grant issue. The parties briefed the issue and the trial court issued its Opinion and Order on May 4, 1999, granting the Government summary judgment (A-15). It issued its judgment on May 28, 1999. Plaintiff filed its notice of appeal on June 21, 1999. The Court of Appeals for the Federal Circuit issued its opinion affirming the Court of Federal Claims on July 20, 2000.

STATEMENT OF FACTS

B&G Enterprises, Ltd., with its principal place of business in Marina Del Ray, California, owns and operates cigarette vending machines in the Los Angeles metropolitan area. The vending machines were located in business establishments pursuant to contracts with the establishment owner, who received a percentage of the sale price of the cigarettes. As a result of the action taken by

the federal government, through the State of California and the municipalities of West Hollywood and Los Angeles, B&G lost placement contracts with the owners of premises where cigarette vending machines were located.

Administration of ADAMHA, the federal statute, was left to the Department of Health and Human Services ("HHS"). Pursuant to ADAMHA, the Secretary of HHS on August 27, 1993, issued a report for implementation of the Act and block grants. 58 Fed. Reg. 45156. The report states in pertinent part:

> Accordingly, the Secretary believes that by requiring States to have laws prohibiting access to minors is a first step in reducing this national health problem. To assist States in implementing the requirements of the statute, the Department will provide technical assistance after issuance of the final rule. We envision such assistance covering matters such as effective enforcement practices and the development of scientifically valid inspections, as well as acceptable alternative mechanisms for funding enforcement activities. pp. 45156-58

Further, the report also included a proposed model statute for adoption by states and municipalities. The model statute imposed a *de facto* ban on cigarette vending machines by severely restricting their location. The HHS section by section analysis of the proposed model statute states in pertinent part:

* * *

> [W]hy ban vending machine sales? The basic problem with these sales is that they do not require human intervention, the active participation of a clerk who sells the product only after observing or checking age. Vending machines are often used now by adolescents, and vending machines will nullify otherwise effective action preventing over-the-counter sales. Sales personnel at a register cannot effectively police even nearby machines while serving other customers. Individual states may wish to consider relevance to preventing widespread availability other than prohibitions on sales. p. 45164

In order to qualify under ADAMHA, California adopted legislation in 1994 for the dispensing of funds under the federal block grant to cities and counties. 6 Calif. Code § 17604. Also adopted were restrictions on the location of cigarette vending machines. West's Ann. Cal. Bus. Code § 22960 (the "STAKE Act").

The California Senate Report states that the STAKE Act was being adopted in order to qualify for the federal block grants and to give the California State Department of Health Services the power to administer and enforce the STAKE Act. The STAKE Act also provides for "sting" operations using minors to catch offenders of the STAKE Act. Such "stings" were required by Congress in 42 U.S.C. § 300x-26 (b)(2)(a).

On December 27, 1995, the California Department of Health Services sent a letter to vending machine operators stating that effective January 1, 1996, cigarette

vending machines could only be located in establishments with an "on-sale public premises" state liquor license.

REASONS FOR GRANTING THE WRIT

The past twenty years have seen a radical change in the manner in which Congress provides for implementation of its legislation. Federal policy is implemented in large part through a provision of block grants to the states. This has resulted in a dramatic restructuring of federalism. The present case presents the Court with the important issue of whether the federal government is absolved of liability for state action that the federal government sets in motion through provision of a block grant. Given a Congressional penchant to use block grants, it behooves this Court to determine the scope of federal responsibility for takings of property effected by the states in fulfilling block grant requirements. What needs clarification is the kind of partnership relationship that is created between the federal government and the states?

The decisions of the Court of Appeals for the Federal Circuit are in a state of confusion on this issue. In Hendler v. United States, 952 F.2d 1364 (Fed. Cir. 1991), the court held that the involvement of state officials in the federal superfund project render the U.S. liable for the state's action. In Hendler the activities of officials from the State of California were attributed to the federal government.

In Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996) (*en banc*), the court plurality, through Judge Plager, held the Government liable for the actions of a state

in converting a railroad easement to a recreational trail under the federal Rails-to-Trails Act.

The criteria set by Hendler and Preseault was if the state was acting under the aegis of the federal government the action was attributable to the federal government for the purpose of liability. However in the case at bar the court adopted a strict common law agency criteria and rejected the approach of the Preseault plurality.

The law of takings is left in a state of uncertainty by the decision in this case. Is the plurality opinion in Preseault the law or is it of no precedential value as stated by the dissent in Preseault at 1555? Is Hendler the law or must an agency relationship be established under the common law? Is the criteria for liability "acting under the aegis of the government" or must there be clear evidence of "coercion" by the government? At what point does the federal government become responsible for the actions of the states? These are questions that can only be answered, in the final analysis, by this Court. When Congress appropriates money through a block grant and attaches conditions to the grant, a state is bound to the terms of those conditions. South Dakota v. Dole, 483 U.S. 203 (1987).

The courts below cited to Griggs v. County of Allegheny, 369 U.S. 84 (1962), but Griggs did not answer these questions. The only question answered by Griggs was whether the county escaped liability for the location of an airport runway because of regulations of the FAA. It never dealt with the issue presented here.

There are currently 555 cigarette vending machine operators with claims pending in 23 essentially identical taking cases in the Court of Federal Claims that are directly

affected by this case. This issue has been stayed in those cases pending final review in this case. The cigarette vendors are a small but old segment of the cigarette distribution system. They reflect less than 1% of cigarette sales yet they are independent from cigarette manufacturers and have been left out of the national settlements regarding cigarette sales. They are small operations, which have been made the scapegoat for the sale of cigarettes to teenagers. Less than 2% of cigarette sales to teenagers come from vending machines. They cry out for relief from a government that has made them the "whipping boy" for big tobacco. Aside from that however, this case raises important issues of federalism that need resolution by this court.

CONCLUSION

WHEREFORE, petitioner, for the foregoing reasons, pray this Court issue a writ of certiorari to review the decision of the Court of Appeals for the Federal Circuit.

Respectfully Submitted,

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APPENDIX

United States Court of Appeals for the Federal Circuit

99-5114

B&G ENTERPRISES, LTD.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appelle.

DECIDED: July 20, 2000

Before LOURIE, CLEVENGER, and LINN, Circuit Judges

LOURIE, Circuit Judge

B&G Enterpries, Ltd. appeals from the decision of the United State Court of Federal Claims granting summary judgment against B&G's taking claim. See B&G Enters., Ltd. v. United States, 43 Fed. Cl. 523 (199). We affirm.

BACKGROUND

In 1992, Congress amended the Public Health Service Act and established Substance Abuse and Mental Health Services ("HHS") and the Center for Substance Abuse Treatment as an agency of SAMHSA. See

ADAMHA Reorganization Act, Pub. L. No. 102-321, § 101(a), 106 Stat. 323, 325 (1992) (codified at 42 U.S.C. § 290aa (1194)). This legislation also gave the HHS Secretary, acting through the Center for Substance Abuse Treatment, authority to provide block grants to states for the purpose of substance abuse prevention and treatment. See 42 U.S.C. § 300x-21(b) (1994). The legislation placed various conditions on a state's entitlement to a block grant, see id. §§ 300x-32, including the requirement that the state "ha[ve] in effect a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18," id. § 300x-26(a)(1). If a state receiving a block grant did not enact a law prohibiting tobacco sales and distribution to persons under the age of 18, HHS was instructed to reduce that state's grant. See id. § 300x-26(c).

In 1993, HHS issued a Notice of Proposed Rulemaking (NPRM) seeking comments on proposed regulations to implement section 300x-26. See 58 Fed. Reg. 45156 (1993). HHS proposed to implement this statutory provision by

> Requiring States to have in place a law which prohibits the sale or distribution of any tobacco product to persons under the age of 18 through any sales or distribution from any location which sells at retail or otherwise distributes tobacco products to customers including but no limited to) locations that sell such products over-the-counter or through vending machines. ... Beyond this, the Secretary does not propose specify the provisions of the State's laws. However, appended to this NPRM is a copy

> of a model law the States may wish to consider.

Id. (emphasis added). The proposed regulation, 45 C.F.R. § 96.130, provided that to qualify for a block grant a state must have in effect "a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18 through any sales or distribution outlet, including over-the-counter and vending machine sales" and that the state take action to ensure compliance with this rule. See id. at 45173. Thus, the proposed regulation merely echoed the language of the statute itself and clarified that it also applied to vending machine retailers. Appended to the NPRM was a "Model Sale of Tobacco Products to Minors Control Act." See Id. at 45165 (Appendix A). The model act banned all vending machine sales of tobacco. See id. Also appended to the NPRM was a report by the Office of Inspector General that discussed some of the ways in which states and localities already limited youth access to tobacco. See id. at 45171-72. The report stated in relevant part as follows:

> Restricting tobacco vending machines is the most commonly observed way States and localities limit youth access to tobacco. In addition to their State laws prohibiting the sale of tobacco to minors, 21 States and Washington DC have passed laws that restrict vending machines in some manner.

Id. at 45171. The proposed regulation did not make tobacco vending machine restrictions a condition of the receipt of the federal block grant, but the NPRM did suggest that states ban tobacco vending machines or restrict their placement in order or limit youth access to tobacco.

Proposed regulation section 96.130 was finalized in 1996. See 61 Fed. Reg. 1492 (1996).

At the time that section 300x-26 was enacted in 1992, California already had a law in place making tobacco sales and distributions to persons under 18 illegal. See Cal. Penal Code § 308(a) (West 1990) ("Every person, firm, or corporation which knowingly sells, gives, or in any way furnishes to another person who is under the age of 18 years any tobacco, cigarette, or cigarette papers, or any preparation of tobacco... is subject to either a criminal sale for a misdemeanor or a civil action"). In fact, Californaia has made the sale and distribution of tobacco to persons under 18 criminal offense since 1911. See 1911 Cal Stat. Ch.288, p. 481, § 1.

In 1994, after section 300x-26 was enacted and the NPRM published, California did enact a law restricting, but no banning, the placement of tobacco vending machines. See Stop Tobacco Access to Kids Enforcement Act ("STAKE"), 1994 Cal. Stat. 1009 (codified at Cal. Bus. Code §§ 22950-61 (West 1999)). California enacted STAKE in order to "reduce[e] and eventually eliminat[e] the illegal purchase and consumption of tobacco products by minors" and to comply with section 300x-26.[1] See Cal. Bus. Code § 22951. Inter Alia, STAKE made it unlawful for cigarettes and other tobacco products to be sold, offered for sale, or distributed from vending machines and similar appliances unless the machines were located within an

[1] "California must fully comply with federal regulations, particularly the 'Synar Amendment,' that restrict tobacco sales to minors and require states to vigorously enforce their laws prohibiting the sale and distribution of tobacco products to persons under 18 years of age." Cal. Bus. Code § 22951 (West 1999). The "Synar Amendment" is the popular name for section 300x-26. See 144 Cong. Rec. S5702-01, S5728 (June 5, 1998); 142 Cong. Rec. E1863-02 (Jan. 26, 1996).

establishment that was licensed to sell alcoholic beverages and the machines were located at least 15 feet from the establishment's entrance, commencing January 1, 1996. See id. § 22960. Thus, STAKE did not ban all tobacco vending machines as suggested by the model act in the 1993 NPRM; it only restricted vending machines to establishments that were licensed to sell alcohol.

B&G owns and operates cigarette vending machines located in business establishments in Los Angeles, California, pursuant to contracts with the establishment owners. B&G sued the United States in the United State Court of Federal Claims, alleging that its cigarette vending machine contracts constituted property interests, that it "lost" vending machine contracts when California's tobacco vending machine restrictions went into effect on January 1, 1996, and that this loss constituted an unlawful taking of property by the federal government without just compensation. Specifically, B&G alleged that California's vending machine law is attributable to the federal government because, it asserts, the state was acting as an agent of the federal government when it enacted the law. The government moved for summary judgment that the federal government did not take B&G's property, asserting that California did not act as an agent of the federal government when it enacted the tobacco vending machine restrictions. The Court of Federal Claims granted the government's motion, holding that California did not act as an agent for the federal government when it enacted section 22960, but rather did so voluntarily for its own benefit. See B&G Enters., 43 Fed. Cl. At 528. B&G timely appealed to this court. We have the jurisdiction pursuant to 28 U.S.C. § 1295(a)(3) (1994).

DISCUSSION

Summary judgment is appropriate if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as s matter of law." U.S. Ct. Fed. Cl. R. 56. We review a grant of summary by the Court of Federal Claims de novo to determine whether the summary judgment standard has been correctly applied. See Winstar Corp. v. United States, 64 F.3d 1531, 1539 (Fed. Cir. 1995) (en banc), aff'd 518 U.S. 839 (1996). Summary judgment is particularly appropriate here. There are no material facts in dispute. The only is legal–whether the Court of Federal Claims properly held that the state of California was not an agent of the federal government when it enacted tobacco vending machine restrictions that interfered with B&G's contracts.

As a preliminary matter, we understand B&G to argue that it suffered a regulatory rather a physical taking, since it does not allege that the federal government physically occupied or destroyed its property,[2] but rather that its vending machine contracts were property rights that were "taken" by federal legislative action. See Greenbrier v. United States, 193 F.3d 1348, 1356 (Fed. Cir. 1999).

The Fifth Amendment provides in relevant part as follows: "nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V, cl. 4. Although the Supreme Court has stated that "[c]ontract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid," United States Trust Co. of N.Y. v. New Jersey, 431 U.S. 1,

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[2] "The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land." Yee v. City of Escondido, Cal., 513 U.S. 519, 527 (1992).

19 n.16 (1997), it has also emphasized that government interference with contractual rights does not necessarily constitute a taking of property:

> Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them. If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking. This is not to say that contractual rights are never property rights or that the Government may always take them for their own benefit without compensation.

Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 223-24 (1986) (internal quotation marks and citations omitted); see also Eastern Enters. V. Apfel, 524 U.S. 498, - (1998); Greenbrier, 193 F.3d at 1356-57. For purposes of this appeal we accept, but do not decide, that B&G's vending machine contracts may constitute "property." See Greenbrier, 193 F.3d at 1357. Even if B&G's contracts are property rights and were affected by the government's actions, we conclude that a taking did not occur.

We agree with the government that California did not act as an agent of the United States by enacting the section 22960 vending machine restrictions and that the United States is therefore not responsible for that law's interference with B&G's vending machine contracts as a matter of law. "Agency is the fiduciary relationship which results from the manifestation of the consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act." Restatement (Second) of Agency § 1(1). There is no manifestation by either the federal government or the state of California of an intent to create an agency relationship under the facts of this case.

First, both the Supreme Court and our predecessor court, the United States Court of Claims, have held that the federal government's conditioning a state or locality's receipt of federal funds on the state's taking a particular action does not make the state or locality an agent of the federal government. See Griggs v. United States, 369 U.S. 84, 89 (1962) (holding that the county government, not the federal government, was liable for the taking of an air easement over plaintiff's property, even though the airport was funded in part by a federal grant based on compliance with federal regulations); D.R. Smalley & Sons, Inc. v. United States, 372 F.2d 505, 507 (Ct. Cl. 1967) (holding that the conditional grant of federal funds to Ohio for highway projects did not make the federal government liable for Ohio's acts or omissions). Like the grants in Griggs and D.R.Smalley, the conditional grant of funds to California did not subject the federal government to liability for California's actions.

Second, California's legislature cannot be considered to have acted under federal authority. The State of California is an independent sovereign, which itself

possesses the authority to enact legislation[3] and thus to regulate the placement of tobacco vending machines, unless preempted by federal law. Before the enactment of section 300x-26, Congress did not regulate the sale of tobacco to minors. Since the field was legislatively unoccupied by the federal government, the states retained the power to so regulate. Section 300x-26(a)(1), by its very terms, does not indicate any preemption of the states' power. Rather, it indicates that Congress did not want to itself impose an age restriction on the sale and distribution of tobacco, but rather wanted the states to continue to regulate in this field. Cf. Campbell v. Hussey, 368 U.S. 297 (1962) (holding that the Tobacco Inspection Act, which imposed uniform standards of classification regulations). Congress's enactment of section 300x-26, therefore, cannot be construed as a grant of authority for California to pass legislation on behalf of the federal government. This is not even a case in which Congress first regulated a particular field and then delegated its authority to regulate that field to another sovereign entity. See United States v. Mazurie, 419 U.S. 544 (1975) (holding that Congress, which regulated the introduction of alcoholic beverages in "Indian country" could validly delegate to Indian tribes its authority to regulate that subject matter because Indian tribes themselves possessed independent authority over the subject matter.) California had, at all times, the inherent authority to enact section 22960. The United States did not delegate to California the authority to enact that law.

Third, this case is distinguishable from those cases in which a state or local official was acting under the

[3] California's legislature derives its power and authority to enact laws from its own constitution. See Cal. Const. Art. IV § 1 ("The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum.")

authority of a federal order or law. See Preseault v. United States, 100 F.3d 1525, 1550 (Fed. Cir. 1996) (en banc) (holding that the federal government was liable for a taking of property where City of Burlington acted under federal authority); Hendler v. United States, 952 F.2d 1364, 1378-79 (Fed. Cir. 1991) (holding that the federal government was liable for a taking of property where California officials, acting under the authority of a federal order, occupied land). The first distinction is that both cases involved a physical occupation, whereas this case does not. Moreover, in each case, an order from the federal government led to state action. In Preseault, an order by the ICC occurred before the city of Burlington physically occupied the land. In Hendler, the EPA issued an order that authorized that state of California to enter upon the land and establish monitoring wells. No such order was issued here.

Finally, California's passage of section 22960 was not enacted for the benefit of the federal government or al Americans. As discussed supra, California enacted restrictions on the placement of tobacco vending machines for two reasons: to vigorously enforce its own law prohibiting tobacco sales to person under 18 (with the goal of reducing and eventually eliminating those sales and underage smoking), and to ensure compliance with section 300x-26 and thus obtain federal funds for its own substance abuse prevention and treatment programs. Thus, California's enactment of section 22960 was for the benefit of its own citizens, not for the benefit of American generally.

We therefore conclude that B&G's property was not taken by the federal government, either by Congress's enactment of section 300x-26 in 1992, by HHS's publication of the NPRM in 1993, or by HHS's

promulgation of section 96.130 in 1996. Congress's enactment of section 300x-26 did not constitute a taking of B&G's "property" because section 300x-26 did not place federal restrictions on the location of tobacco vending machines. Rather, section 300x-26 only conditioned a state's receipt of funds on that state's prohibition of tobacco sales and distributions to persons under 18. As discussed supra, California already had such a prohibition when section 300x-26 was enacted. The enactment of section 300x-26 thus did not by itself affect B&G's vending machine contracts. Moreover, the NPRM published in 1993 only suggested that states ban or place restrictions on tobacco vending machines in order to limit youth access to tobacco. These suggestions were not rules of law affecting B&G's contracts. Lastly, HHS's promulgation of section 96.130 in 1996 also did not constitute a taking for the same reason that Congress's enactment of section 300x-26 did not. Section 96.130 merely echoed and clarified section 300x-26's requirements; it did not ban or place restrictions on the locations of tobacco vending machines.

In sum, it was California's decision to create restrictions on the placement of tobacco vending machines, not the federal government's. Congress may have provided the bait but California decided to bite. If California's enactment of section 22960 interfered with B&G's vending machine contracts, it was not the responsibility of the federal government. The Court of Federal Claims properly granted the government's motion for summary judgment on B&G's taking claim.

CONCLUSION

Because California did not act as an agent of the United States when it enacted a law banning tobacco

vending machines from establishments that were not licensed to sell alcoholic beverages, the United States is not liable for California's interference with B&G's tobacco vending machine contracts with such establishments; it did not "take" B&G's alleged property rights. According, the Court of Federal Claims properly granted the government's motion for summary judgment. The decision of that court is therefore

AFFIRMED.

United States Court of Federal Claims

No. 98-598 C
(Filed: May 4, 1999)

* * * * *		
B&G Enterprises, Ltd. Plaintiff,	*	
v.	*	Fifth Amendment Taking; Federal Block Grants;
United States of America, Defendant.	*	Federal Involvement in State Action
* * * * *		

Douglas B. McFadden, McFadden, Shoreman & Tsimpedes, P.C., Washington, D.C. for plaintiff.

Mark A. Melnick, United States Department of Justice, Washington, D.C., for defendant.

OPINION AND ORDER

HODGES, Judge.

This case is before the court on cross motions for partial summary judgment.[1] Plaintiff claims that a

[1] Plaintiff filed suit alleging a taking based on two theories. First, plaintiff contends that the United States Food & Drug Administration adopted regulations that impermissibly restricted the location of cigarette vending machines. The issue is stayed pending the resolution of Brown & Williamson Tobacco Corp. v. FDA, 153 F.3d 155 (4th Cir. 1998). Cert. Granted, 67 U.S.L.W. 3484. 3490 (U.S. April 26, 1999) (No. 98-1152). The second theory is not dependent on the Fourth Circuit matter, so we removed it for consideration pursuant to Rule 1.

California law effectively banning the use of cigarette vending machines in all but certain specified locations is attributable to the federal Government and that this constitutes a Fifth Amendment taking. Defendant contends that the Substance Abuse Prevention and Treatment Block Grant Program does not create a taking merely because the Government conditioned receipt of the grant on the states' meeting certain minimum criteria approved by the Secretary of Health and Human Services. Plaintiff has not demonstrated that the Government acted affirmatively to deprive it of property or to interfere with its property rights. We grant defendant's motion for partial summary judgment.

BACKGROUND

Plaintiff owns and operates cigarette vending machines located in business establishments in Los Angeles and surrounding areas. The California Legislature passed a law in 1994 effectively banning cigarette vending machines from all premises except those licensed to sell alcoholic beverages by the Department of Alcoholic Beverages Control.[2] Because of that law, plaintiff's contracts with commercial businesses for placement if cigarette vending machines were canceled.

Plaintiff contends that the Federal Government caused California to place restrictions on cigarette vending machines through the Alcohol, Drug Abuse and Mental Health Organization Act, adopted by Congress in 1992.[3] This Act allows the Secretary of Health and Human Services to make block grants to states under certain conditions. The state must have a law providing that it is

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[2] Cal. Bus. & Prof. Code § 22960.

[3] 42 U.S.C. § 300x-21; 42 U.S.C. § 300x-26.

"unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to an individual under the age of 18." 42 U.S.C. § 300x-26(a)(1).

The Act requires that each state receiving funds enforce the law as follows:

> (A) annually conduct random, unannounced inspections to ensure compliance with the law ... and
> (B) annually submit to the Secretary a report describing --
>
> (i) the activities carried out by the State to enforce such law during the fiscal year preceding the fiscal year for which the State is seeking the grant;
> (ii) the extent of success the State has achieved in reducing the availability of tobacco products to individuals under the age of 18.
> (iii) The strategies to be utilized by the State for enforcing such law during the fiscal year for which the grant is sought.

Failure to comply with the statue results in a reduction of funds for the fiscal year by 10 percent, and up to 40 percent by the third fiscal year. 42 U.S.C. § 300x-26(c). The State is expected to enforce the law in a manner that "can reasonably be expected to reduce the extent to which tobacco products are available to individuals under the age of 18." 42 U.S.C. § 300-26(b)(1).

The Secretary of HHS issued final regulations in January 1996. 45 C.F.R. § 96.130. The regulations restate

the conditions set out in the statute. They describe actions that the state should take to enforce the law restricting sale and distribution of tobacco products to individuals under age 18. States are required to conduct a "reasonable number of random, unannounced inspections" for the first and second years of the grant. 45 C.F.R. § 96.130(c). The state must conduct random inspections of over-the-counter and vending machine outlets that cover a wide range of locations in the third and subsequent years. 45 C.F.R. § 96.130(d)(1). The inspections must be conducted annually to provide a probability sample of outlets. "The sample must reflect the distribution of the population under age 18 throughout the State and the distribution of the outlets throughout the State accessible youth." 45 C.F.R. § 96.130(d)(2). Progress reports must be submitted outlining state activities and success achieved in reducing availability of tobacco products to children. Failure to comply results in a reduction in the grant amount.

DISCUSSION

Plaintiff argues that California's *de facto* ban on cigarette vending machines is attributable to the Federal Government. This action resulted in plaintiff's loss of contracts with commercial businesses for placing vending machines on their premises, and thus constitutes a regulatory taking under the Fifth Amendment. California passed legislation to qualify for federal block grants. By enacting this law requiring placement of cigarette vending machines in specific locations, according to plaintiff. Plaintiff cities two cases to support this argument: Hendler v. United States, 952 F.2d 1364 (Fed. Cir. 1991) and Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996).

In Hendler, the EPA issued an administrative order granting to itself and to the State of California access to the

plaintiffs' property to construct and maintain groundwater monitoring wells. Hendler, 952 F.2d at 1369. EPA contractors installed five monitoring wells on plaintiffs' property; the State of California installed at least thirteen more. Id. At 1369-70. Plaintiffs argued that EPA's actions constituted a taking of their property and that the activities of the State of California were attributable to the Federal Government. The Government argued that it could not be held liable for the actions of the State of California.

The court held that California state officials entered the plaintiffs' land under authority granted by the Federal Government. The activities of the state within the scope of the order were attributable to the Federal Government for purposes of the taking claim. Id. At 1379. The court found that "California officials were acting under the authority of the 1983 Order, and in pursuance of the State's formal Cooperative Agreement with the Government to assist in carrying out Superfund activities...with substantial funding from the Government." Id.

In Preseault, the State of Vermont converted a long unused railroad right-of-way into a recreational hiking and biking trail under authority of the Rails-to-Trails Act and by order of the Interstate Commerce Commission. Preseault, 100 F.3d at 1529. Plaintiffs, owners of the underlying fee simple estate. Filed suit against the Federal Government seeking just compensation under the Fifth Amendment. Id.

The Government defended on the ground that because the City of Burlington actually established the trail, the United States should not be the responsible party. Id. This amounted to a taking for which the Government was liable. In other words, either the city or the state was liable, not the United States. The court compared this action to

the action discussed above in Hendler, and found that the city occupied the plaintiffs' property under the Federal Government's authority pursuant to the ICC order. Id. This amounted to a taking for which the Government was liable.

Hendler and Preseault both involved a physical entrance upon land by another pursuant to federal authority. EPA agents entered Hendlers' land with an EPA ordered issued pursuant to federal law. The state was acting as an agent of the Federal Government. Similarly, in Preseault construction crews entered Preseaults' land armed with an ICC order. The court found that Vermont and the United States "were fully invested in the effort to create [a] public trail." Preseault, 100 F.3d at 1551. Neither case involved federal block grants.

Defendant here established a program whereby state would be eligible for federal grants if they met certain conditions. The program was designed to encourage states to limit underage promoting that policy were left to the states.

The Supreme Court considered a takings claim similar to this one in Griggs v. Allegheny County, 369 U.S. 84 (1962). Allegheny County owned and maintained Greater Pittsburgh Airport on land purchased to provide airport facilities. The airport was designed to conform with the rules and regulations of the Civil Aeronautics Administration within the scope of the National Airport Plan pursuant to 49 U.S.C. § 1101. It directed the Administrator to prepare and revise a "national plan for the development of public airports." Griggs. 369 U.S. at 85. The Administrator was authorized to make grants to "sponsors" for this purpose. The receipt of such funds was conditioned upon the sponsors' obtaining title to lands necessary for landing airplanes, and their acquiring such

easements or other interests in lands and air space as needed to comply with airport approach standards determined by the Administrator. Id. At 86. Plaintiff's land was located so close to the northeast runway that the property was rendered unlivable. Id. 86-88.

The Supreme Court rejected plaintiff's taking argument. The Court found that the "[County] decided, subject to the approval of the C.A.A., where the airport would be built, what runways it would need, their direction and length, and what land and navigation easements would be needed. The Federal Government takes noting; it is the local authority which decides to build an airport *vel non*, and where it is to be located." Id. At 89.

In Griggs, the Federal Government conditioned receipt of the funds on the state's meeting certain requirements. The state was free to meet those requirements however it thought best. Just as the county in Griggs could have built the airport in another location or changed the placement of the landing area, so could California have chosen a different method for preventing minors from obtaining tobacco products. The fact that the Government approved and funded the plan makes no difference absent a showing that California somehow was compelled or coerced into restricting the location of the vending machines.

The Government in Griggs imposed more onerous conditions than those imposed by HHS in this case. While the county was responsible for the airport's design, including location of its takeoff and approach areas, the regulatory scheme enacted by Congress and administered by the Agency regulates virtually every aspect of air transit. Id. At 91 (Black, J., dissenting). "These airspaces are so much under the control of the Federal Government that

every takeoff and every landing at airports such as greater Pittsburgh Airport is made under the direct signal and supervisory control of some federal agent." Id. at 92-93. The Court's majority however, determined that the far-reaching federal supervision and control present in Griggs was insufficient to hold the Government liable for a taking.

Other parties have contended that the states' acquisitions of necessary right-of-way that involved federal aid pursuant to the Interstate highway Program were takings by the Federal Government. D.R. Smalley & Sons, Inc. v. United States, 178 Ct. Cl. 593, 372 F.2d 505, cert. Denied, 389 U.S. 835 (1967); and Custom Contemporary Homes, Inc. v. United States, 5 Cl. Ct. 88 (1984). Both decisions emphasized that the Government must take some affirmative action for a takings claim to be successful. The United States cannot be held liable if privat3e property is taken by acts or omissions of the state. D.R. Smalley, 178 Ct. Cl. at 599; see also Custom Contemporary Homes, 5 Cl. Ct. at 90. The court in D.R. Smalley stated:

> The National Government makes many hundreds of grants each year to the various states, to municipalities, to schools and colleges and to other public organizations and agencies for many kinds of public works, including roads and highways. It requires that the projects be completed in accordance with certain standards before the proceeds of the grant will be paid. Otherwise the will of Congress would be thwarted and taxpayers' money would be wasted.

Id. at 597-98.

Louisiana property owners filed suit alleging an un constitutional taking because of flood-plain ordinance passed by the Plaquemines Parish Commission Counsel. Adolph v. Federal Emergency Management Agency, 854 F.2d 732 (5th Cir. 1988). The parish passed these ordinances to participate in FEMA's National Flood Insurance Program. The federal goal under the flood program was to provide subsidized flood insurance to those existing structures in flood-prone areas, while discouraging future unsafe construction in those areas. Id. at 734 n. 2. FEMA required that all new or additional structures in a flood-prone area meet certain elevation requirements. Id. at 734.

"By conditioning the availability of federally-subsidized insurance upon enactment of local flood-plain management ordinances in accordance with federal standards, the NFIP represents a voluntary federal program." Id. at 735; citing Texas Landowners Right Ass'n v. Harris, 435 F. Supp. 1025, 1030 (D.D.C. 1978), aff'd mem., 598 F.2d 311 (D.C. Cir.). Cert. Denied, 444 U.S. 927 (1979). The court notes that the parish was not compelled to participate in the NFIP, so FEMA could not be charged with an unconstitutional taking. Id. at 736. Neither Unconstitutional conditions at6tached to the benefits nor coercion by the Government were present.

Congress my encourage state participation in federal programs by attaching conditions to federal funds. Adolph, 854 F.2d at 735-36. Compliance with these conditions usually is not equated with federal coercion.

Id. at 736 n. 3.[4] It is true that withholding funds may threaten a state's well-being because federal legislation crosses the line between inducement and coercion in some Circumstances. See Montgomery County, Maryland v. Califano, 449 F. Supp. 1230, 1247 (1978), aff'd 599 F.2d 1048 (4th Cir. 1979). But this is not such a situation.

This federal anti-smoking statute mandated broad policy objectives, then passed responsibility for implementation and supervision of the program to Health and Human Services. HHS set minimum standards for participation in the block grant program, and made some suggestions for meeting these standards. The states were free to accept or reject the offer. The procedure for meeting those standards was left to the states. States were encouraged to develop and implement a plan to enforce the law. Non-compliance meant a reduction in funding of up to 40 percent. The federal Government's involvement is qualitatively different from the action in either Hendler or Preseault.

Plaintiff implies that the proposed regulations issued by the Secretary in 1993 demonstrate that the Federal Government somehow compelled California to enact a law restricting the location of tobacco vending machines to adults, or restrict their location.

When a state acts in its sovereign capacity and a taking occurs, the state is responsible. It does not matter whether its actions taken were pursuant to a plan approved by a federal agency.

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[4] The case that the Fifth Circuit relies on is Steward Machine Co. v. Davis, 301 U.S. 548, 589-590 (1937). That case involved an excise tax. The Supreme Court stated, "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." Id. at 589-90.

CONCLUSION

The Government may establish conditions or standards for the states to meet to qualify for federal grants. The states are free to reject or meet those conditions. Absent some affirmative act by the Government, or compulsion or coercion, no state action that results in a taking may be attributed to the United States. HHS regulations did not compel the State of California to ban cigarette vending machines. The state made this decision on its own. The model statute created by HHS was just that – a model. The model offered suggestions that the states might wish to consider or to implement. Defendant's motion for partial summary judgment is GRANTED.

/s/ Robert H. Hodges, Jr.
Robert H. Hodges, Jr.
Judge

United States Court of Appeals for the Federal Circuit

ORDER

A combined petition for rehearing and suggestion rehearing en banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that hears the appeal, and thereafter the suggestion for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing en banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on September 11, 2000.

FOR THE COURT,

/s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: August 22, 2000

United States Court of Appeals for the Federal Circuit

99-5114

B&G ENTERPRISES, LTD.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appelle.

JUDGMENT

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS

in Case NO(s) 98-CV-598

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED July 20, 2000 /s/ Jan Horbaly
Jan Horbaly, Clerk

ISSUED AS MANDATE: September 11, 2000